83-2118

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

Lloyd Vickroy,
Petitioner,

v.

Rockwell International Corporation,
International Brotherhood of Electrical Workers, Local Union 2295
Respondents.

On Petition for Writ of Certiorani from the U.S. Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORANI AND MOTION TO VACATE THE JUDGMENT BELOW

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18 pp

QUESTIONS PRESENTED

Did the magistrate exceed the limitations set by the congress, in Title 28 Section 636.

Did the district court rule as unconstitutional, Federal Rule of Civil Procedure, Rule 4(d)(7).

Did the district court err in not recognizing, plantiff's civil rights, outweighs union barganing agreements.

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OPINIONS BELOW

The opinion and judgment of the U.S. District Court (App. A, pp. A-1 to A-3) is unreported.

The opinion and judgment of the U.S. Court of Appeals, Ninth Circuit (App. B, pp. B-1 to B-3) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit originally dated February 8, 1984 (rehearing en banc denied May 7, 1984) affirming the

judgment of the United States District Court for the Central district of California dated December 6, 1984.

The jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1254(1).

STATEMENT

1. Background.

On June 3, 1982, Petitioner filed a civil complaint, Pro Se, in the United States District Court for the Central District of California, alledging a violation of the plaintiff's civil rights as protected under Title 29 U.S.C. Sec. 159, by employer. Employer failed to allow plaintiff to process grievance, thus causing breach of union agreement. This caused the plantiff to seek jurisdiction of employer, for breach of contract, and union for failure to represent when contract was breached, under Title 29 U.S.C. Sec. 185, 185(a), and Title 28 U.S.C. Sec. 1343(3).

2. Magistrate Rulings.

It is well defined that a magistrate may act only on non-dispositive motions. On all other motions the magistrate is limited to reports and recommendations to be reviewed by a district judge.

The record will show, in this action, the magistrate acted as a district judge, denying motions of default, ruling nonjurisdiction of defendants, issuing magistrate orders not reviewed by a district judge, on dispositive motions, prior to a final report and recommendation.

3. Unconstitutional Ruling.

The district court ruled as unconstitutional F.R.C.P.

Rule 4(d)(7), under color of State of California law, due to a defect in that law requiring return of service, but no provisions for enforcing, any person served, to return service.

4. Civil Rights Ignored.

The lower courts have ruled that civil and constitutional rights of a plantiff cannot be heard until all contracted union agreements have been exhausted.

CONCLUSION

The lower courts are attempting to rule magistrates (unlike bankruptcy court judges) have full rights to act directly on dispositive matters, in any court hearing.

The lower courts have declared State of California law on service of summons and complaint as unconstitutional in federal courts (use of federal marshalls in the U.S. District Court for the Central District of California is no longer permitted). Therefore any error in service rests directly with the district court. *S. Stern & Co. v. U.S.*, 1963, 331 F.2d 310, 51 C.C.P.A. 15, certiorari denied 84 S.Ct. 1169, 377 U.S. 909, 12 L.Ed.2d 179 (App C).

The lower courts in ruling that the plantiff did not exhaust N.L.R.B. procedures, are in direct conflict with this Courts rulings in *Barrentine et al. v. Arkansas Best et al.*, 101 S.Ct. 1437 (1981), and *Clayton v. International Union, etc.*, 101 S.Ct. 2088 (App. C).

REASONS FOR GRANTING THE WRIT

It is felt that a judicial review is in order on limitations of

magistrates, handling of constitutional rulings by magistrates, declaring state law unconstitutional by lower courts, and failure to permit civil rights violations to be resolved in a district court, and more detailed guide lines are needed where the pro se plantiff, and all others in a like situation, in the State of California, will not be denied their 5th Amendment rights of due process, if this petition is elected to be heard.

It is therefore submitted that this petition for a writ of certiorari, a motion to vacate the judgement below, should be granted.

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APPENDIX A

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA
No. CV 82-2748-CHH(T)
Lloyd Vickroy, Plaintiff,
v.
Rockwell International
Corporation, et al., Defendant.
Filed 4 November 1982
Venetta S. Tassopulos, U.S. Magistrate
Report and Recommendation of Magistrate

This Report and Recommendation is filed pursuant to the provisions of 28 U.S.C. Section 636 (b)(1)(B) and General Order No. 194 of the United States District Court for the Central District of California.

On June 3, 1982, plantiff filed a civil complaint.

The complaint contained a number of attachments and in its entirety failed to set forth in an understandable fashion the basis of jurisdiction and the factual basis for the alleged legal causes of action.

Two defendants were named: Rockwell International Corporation (hereinafter "Rockwell") and International Brotherhood of Electrical Workers, Local Union 2295 (hereinafter "International Brotherhood").

A motion to Dismiss filed by defendant International Brotherhood was granted on the ground that the Court lacks jurisdiction over the subject matter of the action, that no claim was stated for deprivation of civil rights, and that the complaint failed to allege facts to state any claim upon which relief can be granted.

Prior to the hearing on International Brotherhood's Motion to Dismiss, plantiff filed a "Motion for Amended Complaint." Defendant International Brotherhood filed opposition thereto.

Plantiff also filed a Motion for Default alleging Rockwell's failure to file a response. Rockwell filed its opposition to the Motion for Default correctly noting that Rockwell had not been properly served.

On August 18, 1982, a hearing was held on the pending motions.

Defendant's Motion to Dismiss the complaint was granted. Plantiff was permitted to file the tendered first amended complaint. The Court found the complaint to be deficient, and ordered that it be dismissed.

The Court granted leave to plantiff to file a second amended complaint and advised plantiff that further amendment would not be permitted.

A Second Amended Complaint was filed on September 7, 1982.

Plantiff again filed a Motion for Default against Rockwell.

The Motion for Default was denied *sua sponte* since Plantiff again failed to properly serve Rockwell.

Defendant International Brotherhood again filed a Motion to Dismiss.

It is clear that plantiff failed to amend the deficient complaint to state facts sufficient to state any claim upon which relief can be granted. (See defendant International Brotherhood's Memorandum of Points and Authorities, p.3.)

Moreover, plantiff's attempt to allege violation of the National Labor Relations Act fails because there are no facts showing that plantiff has exhausted the remedies

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 82-6119
Lloyd Vickroy, Plantiff-Appellant
v.
Rockwell International
Corporation, International
Brotherhood of Electrical
Workers, Local Union 2295.
Defendants-Appellees.
Filed February 8, 1984
Trask, Choy, and Skopil, Circuit Judges
Memorandum*

The appellant, Lloyd Vickroy, appeals pro se from the district court's dismissal of his second amended complaint. Vickroy filed a complaint against his employer, Rockwell International Corporation ("Rockwell") and his union, International Brotherhood of Electrical Workers, Local 2295 ("IBEW"). Vickroy apparently intended to challenge Rockwell's alleged failure to make a cost-of-living adjustment and the Union's alledge failure to provide representation or conduct a grievance proceeding. The district court found that Vickroy had not properly served Rockwell, that the court lacked jurisdiction over the National Labor Relations Act claim, and that Vickroy's complaint failed to state a claim. After allowing Vickroy two opportunities to amend, the court dismissed the complaint as to both defendants. We affirm.

Issues

1. Did the district court have personal jurisdiction over Rockwell?
2. Did Vickroy waive his right to appeal by filing an untimely objection to the magistrat's report?
3. Did Vickroy properly state a claim for relief?

Discussion

Personal Jurisdiction

Vickroy contends that the district court had personal jurisdiction over Rockwell because: (1) Rockwell was properly served; and (2) Rockwell's objection to the motion for default constituted a general appearance.

Vickroy did not perfect service on Rockwell. Pursuant to Fed.R.Civ.P. 4(c)(2)(C)(i), Vickroy attempted to use the service by mail provision authorized by California Civil Procedure Code Section 415.30. Under the express terms of section 415.30(c), service is not completed until a written acknowledgement of receipt of the summons has been returned to the sender. Here, no written acknowledgement exists. Vickroy's attempted service is deficient under Fed.R.Civ.P. 4(c)(2)(C)(ii).

The Federal Rules of Civil Procedure have abolished the distinction between special and general appearances. *See* Fed.R.Civ.P. 12(b); *Wright v. Yackley*, 459 F.2d 287, 291 (9th Dir. 1972). Rockwell based its objection to Vickroy's motion for default solely on his failure to serve process. By filing this objection, Rockwell did not submit to the jurisdiction of the court. *See Hays v. United Fireworks Mfg. Co.*, 420 F.2d 836, 844 n.10 (9th Cir. 1969).

Failure to object to Magistrate's Report

The Ninth Circuit has recently held that a litigant's failure to object to a magistrate's recommendation will not bar an appeal from the district court's decision. *Britt v. Simi Valley Unified School District,* 708 F.2d 452 (9th Cir. 1983).

Claims Against The IBEW

The district court found that Vickroy's complaint did not provide a clear statement of facts showing that he was entitled to relief and that the court lacked jurisdiction over the alleged NLRA claims. The court allowed an opportunity to file a second amended complaint even though the first two complaints were improperly pleaded. Vickroy did not give any indication that he would cure the defects.

When the district court dismisses a complaint for failure to comply with the pleading rules, this court will uphold the dismissal unless the district court has abused its discretion. *Wood v. Santa Barbara Chamber of Commerce,* 699 F.2d 484, 485 (9th Cir. 1983); *Schmidt v. Herrmann,* 614 F.2d 1221, 1223-24 (9th Cir. 1980). The fact that Vickroy is pro se mitigates in his favor. Nonetheless, a defendant is entitled to know the claims that he must defend. Vickroy's claims against the IBEW are not stated clearly.

The judgment of the district court is AFFIRMED.

*Per Ninth Circuit Rule 21, this disposition is not intended for publication and shall not be cited as precedent.

Filed May 7, 1984

Trask, Choy, and Skopil, Circuit Judges

Order

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of an en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX C

S. Stern & Co. v. U.S., 1963, 331 F.2d 310, 51 C.C.P.A. 15, certiorari denied 84 S.Ct. 1169, 377 U.S. 909, 12 L.Ed. 2d 179

"A court may promulgate rules and interpret them as adjuncts fo dispensation of justice and orderly and expedient administration of its functions, with limitation that substantial rights of litigants be not unduly circumscribed."

Barrentine et al. v. Arkansas Best et al., 101 S.Ct. 1437(1981)

"Courts should defer to an arbitration decision based on a collective bargaining agreement, but it is a different matter when an employee claims rights guaranteed by law."

Clayton v. International Union, etc., 101 S.Ct. 2008.

"An employee seeking a remedy for alledged breach of collective-bargining agreement must attempt to exhaust any exclusive grievance and arbitration procedures established by that agreement before he may maintain a suit against his union or employer under Labor-Management Relations Act."